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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. KYLIN DION SMITH, Defendant and Appellant.	F072701 (Super. Ct. No. F11906258) **OPINION**

APPEAL from a judgment of the Superior Court of Fresno County. John F. Vogt, Judge.

Deborah L. Hawkins, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris and Xavier Becerra, Attorneys General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Catherine Chatman, Sean M. McCoy, and Kevin L. Quade, Deputy Attorneys General, for Plaintiff and Respondent.

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INTRODUCTION

Defendant Kylin Dion Smith was convicted by jury of the first degree murder of Felipe Atilano (Pen. Code,[1] § 187, subd. (a); count 1), the attempted second degree robbery of Atilano (§§ 664, 211; count 2), and the attempted second degree robbery of Isidro Madera (§§ 664, 211; count 4). As to count 1, the jury found true an aggravating circumstance alleging the murder was committed in the commission of a robbery (§ 190.2, subd. (a)(17)(A)), and a circumstance alleging defendant was 17 years old at the time of the murder. As to all counts, the jury found defendant personally discharged a firearm causing death or great bodily injury (§ 12022.53, subds. (d), (e)(1)). In a bifurcated proceeding, the court found true an allegation that defendant had committed all counts for the benefit of, at the direction of, or in association with, a criminal street gang within the meaning of section 186.22, subdivision (b)(1).

Defendant received a sentence of life without the possibility of parole on count 1, with a term of 25 years to life for the firearm enhancement. On count 4, the court imposed an upper term of two years six months, with a term of 25 years to life for the firearm enhancement. The court stayed punishment on count 2 and stayed punishment on the gang enhancements attached to all counts.

On appeal, defendant claims (1) the trial court erred in failing to consider and apply all of the mandatory factors under *Miller v. Alabama* (2012) 567 U.S. 460 (*Miller*) in sentencing him to life without the possibility of parole (LWOP), (2) defendant's sentence on counts 2 and 4 is unauthorized, and (3) the trial court erred when it imposed a parole revocation restitution fine. We conclude there is insufficient evidence to show the court considered all of the *Miller* factors in sentencing defendant. We further conclude defendant's sentence on counts 2 and 4 is unauthorized. In light of our holding, we will vacate defendant's sentence and remand the matter to the trial court for resentencing.

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[1] All undefined statutory citations are to the Penal Code unless otherwise indicated.

Because this matter must be remanded, the issue of whether the parole revocation restitution fine is unauthorized is moot.

FACTUAL AND PROCEDURAL HISTORY

Prosecution's Case

The Murder of Felipe Atilano

On October 2, 2011, at around 6:00 a.m., police responded to a single story apartment complex in southwest Fresno commonly referred to as "the Brownies." Upon arrival, police discovered Felipe Atilano lying face down next to a minivan. Atilano had been shot in the head.

Atilano worked in agriculture outside of Fresno. He had been paid the day before and had immediately cashed his $400 or $450 check. Police observed Atilano's pants pockets had been turned inside out and loose change was scattered around his body. Atilano was transported to the hospital. He died as a result of his injury. An autopsy revealed Atilano had been shot at close range behind his left ear.

Law enforcement processed the minivan for evidence. A .380-caliber bullet was discovered around the passenger's side of the vehicle. In addition, the van's glove box was open and the owner's manual, vehicle registration, and insurance information were found on the floorboard of the van.

Detective Andre Benson was assigned to investigate Atilano's murder. Benson had received anonymous phone calls identifying the potential suspects as Walter King and a light-skinned Black male named "Kyle." The tip indicated Kyle was from Los Angeles and was involved with a gang called the Hoover Crips. A latent fingerprint lifted from the owner's manual found in the minivan was subsequently matched to defendant.

The Shooting of Isidro Madera

On the evening of October 14, 2011, 70-year-old Isidro Madera was returning from the Family Food Market near his home in southwest Fresno when he was confronted by a young, light-complected, Black male. The male, a teenager, demanded Madera's wallet. Madera saw six more Black male youths standing nearby. Madera responded "[he] didn't have money," and stated, "All I have is sodas." The teen grabbed the bag and put his foot in front of Madera, attempting to trip him.

Two additional youths approached and one began kicking Madera. The light-complected male pulled out a handgun and fired nine shots at Madera. Madera was struck multiple times, sustaining injuries to his wrist, groin, and legs. The group fled.

Madera retreated back to the store to seek help. He was transported to the hospital. Madera survived his injuries but sustained permanent damage affecting the use of his hand and his ability to walk.

Detective Conrado Martin was assigned to investigate Madera's shooting. Based on reports by responding officers and an anonymous tip, Martin drove to the Summer Hill apartment complex, located just yards away from the Family Food Market. He reviewed security camera footage of the complex recorded the day of the shooting. The footage showed a group of Black teens—defendant, King, Keba Young, Keifer McKinney, Freddie Wilson, and Donte Erby-Bail—walk through the apartment complex, jump a back fence, and begin heading in the direction of the Family Food Market shortly before the shooting.

Martin was aware of Benson's investigation of Atilano's murder. During the course of the investigation, Martin received information indicating the same parties had been involved in both crimes.

Police Questioning

On October 27, 2011, Detectives Benson and Martin questioned defendant. When Benson asked about the shooting of Atilano, defendant claimed to have been at his

residence not far from the shooting. At about 2:30 a.m., he had left his home to purchase marijuana. While out, defendant ran into his friend, King, and John Luke, a member of the local Strother gang. Defendant told Benson that King asked him to act as a lookout during a "lick," which defendant understood to mean a robbery. Defendant agreed.

The three entered the Brownies apartment complex and observed a male seated behind the wheel of a parked minivan. Defendant saw King open the driver's side door of the van using his sleeve. John Luke pointed a handgun at the man inside, who appeared to be drunk or sleeping. Defendant turned away and heard a pop. When he looked back, he saw John Luke hand the gun to King and then pull the victim onto the ground.

Defendant approached the victim's body and began checking the victim's pockets. John Luke discovered some money in the victim's front pocket. The group fled the scene. Defendant claimed he did not receive any of the money taken from the victim.

With respect to the Madera shooting, defendant told detectives he was at the Summer Hill apartment complex "hanging out" with a group of people, including Zombie, Active, Lil Tonio, Lil Walt (King), Freddie Wilson, Paul, and Tae Tae. The group walked to Anybody's Market to buy "blunt wraps" and then continued to the Family Food Market. Lil Tonio stated, "I'm gonna catch a Mexican leaking," which meant he was going to rob a Mexican individual. Defendant protested the idea.

When an elderly Mexican man exited the market, Zombie pulled a gun on the man and demanded he "give it up." Active tried to hit the man. The victim swung a bag of bottles to defend himself and hit one of the attackers. According to defendant, Zombie raised his gun and fired at the victim multiple times.

Detectives asked defendant how many times his group had previously robbed a Mexican person. Defendant eventually admitted "about two or three times." When detectives told defendant they believed he was lying about his version of events, he agreed. Defendant then claimed Active had approached the victim with a gun.

Defendant told detectives he watched the incident while Active, Wilson, and Keba Young participated in the robbery and attack. Defendant remained firm that Active was the shooter.

Benson and Martin questioned King separately, and then questioned King and defendant jointly. King confirmed everything he had stated in his individual interview had been truthful. Defendant, on the other hand, admitted he made up the name "John Luke" and that only he and King were present during Atilano's murder. Defendant continued to deny responsibility for the shooting, asserting, "Point blank … I didn't shoot him." He insisted King had pulled the trigger. King continued to insist defendant "did it."

Defendant admitted to searching Atilano's pockets following the shooting, and he told detectives he rummaged through the minivan. He maintained he did not take any money from the victim.

Detective Martin then separately interviewed defendant about the Madera shooting. Defendant told Martin that King had suggested robbing Madera, and defendant had only "told [Madera] to give it up." Defendant's cousin, Erby-Bail, swung at Madera and the victim swung back. In response, defendant aimed his handgun at Madera's legs and fired. After the shooting, defendant gave the firearm to Young, who disposed of it.

When asked how many other times he and his friends had robbed Mexican individuals at that location, defendant told detectives, "I did it two times." Defendant apologized for having given detectives "bullshit this whole time," explaining he could only expect King to "man up" about having shot Atilano if he (defendant) "man[ned] up" to having shot Madera.

Defense's Case

Defendant testified in his own defense at trial. He stated he moved from Texas to Fresno in 2011 to live with his sister. He came to Fresno so he could graduate from high school. Defendant explained King, McKinney, Erby-Bail, and Young were relatives.

On October 2, 2011, King called defendant and asked if he wanted to "hit a lick" at a nearby store. Defendant declined. Later that night, King called defendant and stated he "found another lick" at the Brownies apartment complex. Defendant met King at the Brownies. They attempted to enter an open window of one of the units, but left when they saw someone inside. The two argued about "trying to get a lick," until they agreed to find a car to break into.

While in the parking lot, they came upon a van with music playing inside. A man was sleeping in the driver's seat. Defendant quietly opened the passenger's side door of the vehicle and began rifling through the glove box and shuffling through some papers. He determined there was nothing in the van to steal.

As defendant was walking around the back of the van, he heard a single gunshot. He saw King pull Atilano from the van and begin rummaging through Atilano's pockets. Defendant asked King what he was doing; King told him to shut up. Defendant took off running.

On October 14, 2011, just a few weeks later, defendant was hanging out with King, Erby-Bail, Young, Wilson, and McKinney at the Summer Hill apartments. The group went to a nearby market to purchase some blunt wraps. Erby-Bail suggested robbing a Mexican man heading from the store in their direction. As Madera approached, Erby-Bail walked out in front of him and demanded his money. Defendant and Young came around the man's side, and defendant took a swing at him. The man swung his shopping bag in defense. Defendant heard a gunshot, he stepped back and saw Erby-Bail fire six or seven shots at Madera. Defendant denied shooting Madera.

With respect to his prior statements to the detectives, defendant claimed he told the detectives that a man named "John Luke" had killed Atilano because he wanted to protect King. However, when defendant realized King was trying to blame him for the murder, he told the detectives the truth.

As to the shooting of Madera, defendant admitted he had lied about the fact that men named "Zombie" and "Active" had shot Madera. He claimed he falsely admitted to the shooting to protect his cousin, Erby-Bail. Defendant felt guilty because he was the person who had encouraged Erby-Bail to move to Fresno. Defendant denied shooting Madera.

ANALYSIS

I. The *Miller* Factors

In his first claim on appeal, defendant contends the trial court failed to apply the factors set forth under *Miller*, *supra*, 567 U.S. 460. We conclude the record is ambiguous as to whether the court gave due consideration to each of the factors set forth under *Miller*. As a result, we will remand this matter back to the court for resentencing.

A. The Probation Officer's Probation Report

The probation officer's report noted that prior to defendant's arrest, defendant lived with his sister. He was raised by his mother until age eight or nine, and then by his aunt and his grandmother. Defendant did not know his father. He described his relationship with this family as "'[g]ood for the most part.'"

Defendant was unemployed, but he had previously worked for his aunt's photography business when he lived in Texas. His highest level of education completed was the 11th grade. Defendant reported no mental health issues, and he denied using mental health services or psychotropic medications.

Defendant admitted to being a member of an unspecified criminal street gang, and he had a history of using alcohol and controlled substances. He admitted to using marijuana and cocaine the day of his arrest.

With respect to Atilano's murder, defendant claimed "Luke" perpetrated the shooting. Although he denied shooting Atilano, he expressed remorse for the crime and told police "[h]e had been praying and asking for forgiveness every day since the

shooting." Defendant initially denied shooting Madera, but during police questioning, he admitted shooting Madera.

The probation officer noted defendant had several prior juvenile arrests in Texas for the following misdemeanors: disruptive activities in school, criminal trespass, and making a terroristic threat against public safety. He was sentenced to six months of probation for disruptive activities.

The probation officer's report recommended defendant be sentenced to LWOP on count 1, with a firearm enhancement; and two years six months on counts 2 and 4, with a firearm use enhancement. The report further recommended all gang enhancements be stayed pursuant to section 654.

Under California Rules of Court, rule 4.421, the probation officer identified several factors in aggravation of defendant's sentence, including the high degree of cruelty, viciousness, or callousness of defendant's crimes; the planning, sophistication, or professionalism he used to carry out the crimes; his violent conduct; and his prior sustained juvenile delinquency proceedings, which were "numerous or of increasing seriousness." Other than the fact that defendant's prior performance on probation had been satisfactory, the probation officer found no circumstances in mitigation of defendant's sentence.

B. Sentencing

Prior to sentencing, the prosecutor filed a brief advocating for the court to sentence defendant to LWOP for the aggravated murder of Atilano. Pursuant to section 190.5, subdivision (b), the court had discretion to impose LWOP or a term of 25 years to life.

Defendant was 17 years 8 months old at the time of Atilano's murder. The prosecutor stated the only mitigating factor was defendant's juvenile status, noting however, that "[i]f he had been 4 months older the court would not have any discretion and a mandatory sentence of LWOP would be imposed." With respect to the presence of

aggravating factors, the prosecutor asserted defendant's crime was "cold and calculated." Atilano had been shot in the head as he slept in his van. Although defendant could hear Atilano gasping for air, defendant searched through Atilano's pockets for valuables. Moreover, while defendant claimed King, his accomplice, shot Atilano, he described the crime as "premediated," which means, "you sat there and thought about it before you did it."

Defense counsel did not submit a sentencing brief, nor did he submit any mitigating evidence on defendant's behalf.

At the sentencing hearing, the court indicated it had received and reviewed the prosecutor's brief and the probation officer's report. Defense counsel, addressing the prosecutor's discussion of *Miller* in his sentencing brief, urged the court to "consider mitigating circumstances before imposing the harshest … penalty possible for juveniles." Counsel explained defendant's age at the time of the offense should be taken into account, as should his family and home environment, and the circumstances of the underlying offense. He did not provide any details nor evidence of any potentially mitigating factors.

Defense counsel further asserted the verdicts supported a finding that defendant had not shot Atilano. He explained because defendant was convicted of the attempted robbery of Atilano, rather than the charged offense of robbery, the jury apparently found Walter King had perpetrated the shooting. As a result, counsel requested the court exercise its discretion to impose a sentence of 25 years to life rather than LWOP.

The prosecutor emphasized the court needed to consider all factors in deciding whether to impose a sentence of life without the possibility of parole. According to the prosecutor, defendant was "a natural leader," and was "directing the activities" involving the attempted robbery and shooting of Madera and the murder of Atilano. The prosecutor noted that while defendant may have had "a minimal criminal history," his police interviews demonstrated "sophistication that belies his years."

The trial court sentenced defendant to LWOP. In so doing, the court provided the following explanation:

> "… I have gone through the RPO relating to the circumstances in aggravation, the circumstances in mitigation under Rules of Court 4.421, 4.423 relating to the crime and the defendant. You know, I—I will say that a review of his history, which is exclusively documented to be out of Texas, which is as I understood the situation, he'd been in Texas and then he came back out here to California because things were not going well in Texas.
>
> "So we show that his last arrest was, without any type of disposition being noted, was in November of 2009 and less than two years—and that was for a terroristic threat against public safety. Now, it's listed as a misdemeanor here and I'm not sure exactly what that translates to in the California Penal Code, but it certainly shows a step up in the level of criminal activity from disruptive activities in school to a criminal trespass, threats against a public safety officer. Less than two years later this murder is committed here in California by someone who is four months shy of being an adult.
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> "So, quite frankly, the trajectory of [defendant]'s criminal behavior ramped up exponentially in a matter of a very little period of time. And I think a point that [the prosecutor] made about looking at the circumstances that were brought forth before the jury, looking at all of those interviews, looking at that surveillance videotape of the defendant leading the others through the courtyard of the apartment complex, I don't see [defendant] as being an outsider. I don't see him as being an insignificant player in any of these activities. I don't see him as being a follower.
>
> "Quite frankly, in looking at the circumstances, both from the standpoint of applying the Rules of Court to find circumstances in aggravation and mitigation, the circumstances and criteria that would affect concurrent and consecutive sentences, that's one thing. And I pretty much adopt the findings that the Probation Department makes on page 10 and on 11. But looking at it from the standpoint of the most critical determinations we must make here, and that is whether the court should impose this penalty of life without the possibility of parole, I think everything that I've just alluded to, mentioned and expressly cited points to the fact that [defendant] really does deserve that.

> "I think that when you look at the trajectory of his criminal conduct within a very short period of time it just simply makes that exercise of discretion more complete and concrete."

C. Legal Principles

The Eighth Amendment to the United States Constitution, which is applicable to the states via the due process clause of the Fourteenth Amendment (*Robinson v. California* (1962) 370 U.S. 660, 675 (conc. opn. of Douglas, J.); accord, *Graham v. Florida* (2010) 560 U.S. 48, 53 (*Graham*)), outlaws the imposition of "cruel and unusual punishments." The Eight Amendment is the bedrock of an emerging jurisprudence recognizing the distinct characteristics of youth compel treating juveniles differently from adults for purposes of sentencing.

In *Roper v. Simmons* (2005) 543 U.S. 551 (*Roper*), our Supreme Court held the Eighth Amendment forbids imposition of the death penalty on juvenile offenders under 18 years of age. (*Roper*, at p. 571.) Because of the "diminished culpability" of juveniles, the court found the penological justifications for the death penalty, including retribution and deterrence, apply with less force than to adults. (*Ibid.*) Recognizing the inherent danger in permitting consideration of the death penalty on a case-by-case basis, the court imposed a categorical rule barring imposition of the death penalty upon minors. (*People v. Palafox* (2014) 231 Cal.App.4th 68, 84.) The court explained: "An unacceptable likelihood … that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course, even where the juvenile offender's objective immaturity, vulnerability, and lack of true depravity should require a sentence less severe than death." (*Roper*, at p. 573.)

Five years after *Roper*, the court limited the scope of punishment applicable to juvenile offenders convicted of nonhomicide offenses in *Graham*, *supra*, 560 U.S. 48. There, the court held that the Eighth Amendment prohibits sentencing a juvenile convicted of a nonhomicide offense to LWOP. (*Graham*, at p. 75.) The court reasoned no legitimate penological interest justifies an LWOP sentence for juvenile nonhomicide

offenders. (*Id.* at pp. 74–75.) As in *Roper*, the *Graham* court created a categorical ban on the imposition of LWOP sentences to juveniles convicted of nonhomicide offenses. The court explained: "This clear line is necessary to prevent the possibility that [LWOP] sentences will be imposed on juvenile nonhomicide offenders who are not sufficiently culpable to merit that punishment." (*Graham*, *supra*, at p. 74.)

Two years later, in *Miller*, *supra*, 567 U.S. 460, the court held that the Eighth Amendment "forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders," even for those convicted of homicide. (*Id.* at p. 479.) The court explained, "By making youth (and all that accompanies it) irrelevant to imposition of that harshest prison sentence, such a scheme poses too great a risk of disproportionate punishment." (*Ibid*.) However, the court emphasized it was not imposing a categorical ban on LWOP sentences imposed on juvenile offenders: "Our decision does not categorically bar a penalty for a class of offenders or type of crime …. Instead, it mandates only that a sentence follow a certain process—considering an offender's youth and attendant characteristics—before imposing a particular penalty." (*Miller*, at p. 483.)

In *People v. Gutierrez* (2014) 58 Cal.4th 1354, 1387, the California Supreme Court held that sentences for 16- or 17-year-old juveniles who commit special circumstance murder must be selected without a presumption in favor of LWOP. Section 190.5, subdivision (b) confers discretion on sentencing courts to impose either an LWOP term or a term of 25 years to life on 16- and 17-year-old offenders convicted of special circumstance murder. (*Gutierrez*, *supra*, at p. 1387.) The court held "construing section 190.5(b) to establish a presumption in favor of life without parole raises serious constitutional concerns under the reasoning of *Miller* and the body of precedent on which *Miller* relied." (*Id.* at p. 1387.)

The *Gutierrez* court further explained *Miller* requires a determination of "whether a particular defendant is a '"rare juvenile offender whose crime reflects irreparable

corruption.”’” (*People v. Gutierrez*, *supra*, 58 Cal.4th at p. 1388; see *Miller*, *supra*, 567 U.S. at pp. 479–480; *Roper*, *supra*, 543 U.S. at p. 573; *Graham*, *supra*, 560 U.S. at p. 68.) Thus, in considering whether to impose a sentence of LWOP on a juvenile offender under section 190.5, subdivision (b), a sentencing court must admit and consider relevant evidence of the following factors set forth in *Miller*: (1) the juvenile’s age and its impact on his or her culpability; (2) the juvenile’s family and social circumstances; (3) the circumstances of the homicide, including the juvenile’s role in the offense; (4) the impact of the juvenile’s youth on his or her ability to deal with law enforcement and assist in a defense; and (5) the possibility of rehabilitation. (*People v. Gutierrez*, *supra*, at pp. 1388–1389; *Miller*, *supra*, at p. 478.)

A. Legal Analysis

Defendant contends the trial court sentenced him to LWOP without sufficient consideration of the *Miller* factors. From the record, we are unable to determine whether the trial court gave due consideration to each of the *Miller* factors. The law imposes no requirement for the superior court to state the *Miller* factors and to discuss evidence applicable to each factor on the record. However, we believe the severity of an LWOP sentence compels the need for a clear record. The failure to develop an adequate record deprives this court of meaningful appellate review of defendant’s claim. Although it appears the court here complied with *Miller*, we cannot be certain based on the record before us. Accordingly, the matter must be remanded to the superior court for resentencing.

The Attorney General contends we may infer the trial court gave due consideration to each of the *Miller* factors for two reasons. First, at sentencing, the parties agreed the court was required to “‘consider all the factors,’ including any evidence of ‘the defendant’s history.’” According to the Attorney General, although the court did not explicitly cite *Miller* or state its reasoning under the *Miller* factors, “[t]he record leaves no doubt that the court was aware of each of *Miller*’s factors, its obligation to consider

them before imposing sentence, and its discretion to impose a lesser sentence if those factors weighed in that direction." Second, the Attorney General argues, even if the court's awareness of its obligation is unclear from the record, because *Gutierrez* was published before defendant was sentenced, we may presume the court was aware of its obligation to consider the *Miller* factors.

While the issue is close, on this record, we cannot be confident the *Miller* factors were fully explored or considered—a requirement before imposition of an LWOP sentence on a juvenile can be valid under the federal Constitution. As we explain below, we find unpersuasive the Attorney General's assertion such an inference may reasonably be drawn from the record.

First, the fact the parties agreed the court was required to consider the *Miller* factors does not permit us to infer the court gave due consideration to each factor. The prosecutor referenced *Miller*, *supra*, 567 U.S. 460 in his sentencing brief, and he explained the court was required to consider the *Miller* factors "'before imposing the harshest penalty possible for juveniles.'" At the sentencing hearing, defense counsel noted "[the prosecutor] cited the Miller case that stated … the sentence of life without parole is the most Draconian sentence possible for somebody who was in [defendant]'s position at the time of this offense …." Defense counsel further explained, "[T]he court should consider mitigating circumstances before imposing the harshest … penalty possible for juveniles." He argued defendant's age at the time of the offense dictates he "should not be treated the same way as an adult," and that "his family and home environment should be taken into account." Finally, defense counsel argued because the jury found defendant guilty of attempted robbery on count 2, the jury impliedly found Walter King had shot Atilano.

While the parties mentioned *Miller* and discussed some of the *Miller* factors at defendant's sentencing hearing, this does not show the court fully considered each factor. Further, although the probation officer's report contains some facts pertinent to *Miller*,

the report does not mention or discuss the *Miller* factors. While the prosecutor's brief does list these factors, the brief emphasizes the callous nature of defendant's crimes, omitting discussion of the other *Miller* factors. Meanwhile, defense counsel, who was tasked with addressing all potentially applicable factors, made virtually no effort to submit mitigating evidence on defendant's behalf.

We are troubled by defense counsel's failure to submit so much as a sentencing brief when he indicated there were potentially mitigating factors at defendant's sentencing hearing. To the extent counsel did mention there were mitigating factors present, such as defendant's family and home environment, he never offered any details explaining why this or any other factor was mitigating. The probation officer's report indicates defendant's father was never part of his life, he had been raised by his mother until age eight or nine, and he was raised by his aunt and grandmother thereafter until he went to live with his sister in Fresno. Defendant had family members and associates in Fresno who were active gang members, including Erby-Bail and Walter King, and defendant lived in gang territory. While the court may have considered this evidence and found it was only nominally mitigating, we decline to infer as much in the absence of a clearer record.

We further note that although defense counsel advised the court defendant's age at the time of the offenses must be taken into account, he never offered evidence or argument as to defendant's "immaturity, impetuosity, and failure to appreciate risks and consequences." (*Miller*, *supra*, 567 U.S. at p. 477.) Instead, the balance of defense counsel's argument focused on the jury's findings. Defense counsel argued because the jury convicted defendant of attempted robbery rather than the robbery on count 2, the jury must have believed Walter King perpetrated the shooting of Atilano. The sentencing court expressed its view that the jury's verdict reflected a finding "about what, if anything, was taken [from Atilano]," rather than who shot him.

Contrary to defense counsel's assertions, the jury made no express or implied finding about whether defendant was a direct perpetrator or an aider and abettor in Atilano's murder. Indeed, the jury was instructed defendant could be found guilty based on either theory. At trial, the prosecutor adduced evidence showing that based on defendant's position and the trajectory of the bullet, defendant was the direct perpetrator of the shooting of Atilano. While the prosecutor in closing argument emphasized defendant had shot Atilano, he explained defendant could also be found guilty as an aider and abettor. The jury's verdict does not indicate under which theory defendant was found guilty on, and defense counsel's assertions to the contrary are unpersuasive.

While Atilano's murder was undoubtedly cold and calculated, the reprehensible nature of defendant's crime is not the sole consideration under *Miller*. However, when a trial court is forced to make a sentencing decision based on the nature of the defendant's crimes, in addition to whatever paltry facts may be gleaned from a probation report, an unacceptable likelihood exists that the brutality of a defendant's crime will compel the harshest sentence possible. For these reasons, and under the unique circumstances of this case, we decline to infer the court gave due consideration to each of the *Miller* factors based on the parties' vague references to and discussion of some of the factors.

We note our Supreme Court has held "[s]ection 190.5(b) authorizes and indeed requires consideration of the *Miller* factors." (*People v. Gutierrez, supra*, 58 Cal.4th at p. 1387.) The *Gutierrez* court's conclusion relied on the premise that the aggravating and mitigating factors in section 190.3 and under the California Rules of Court may be used as guidelines by the court in deciding how a juvenile offender should be sentenced under section 190.5. The court stated "[u]nder section 190.5(b), a sentencing court must consider the aggravating and mitigating factors enumerated in … section 190.3 and the California Rules of Court." (*People v. Gutierrez*, *supra*, at p. 1387.)

Here, from the trial court's comments, it appears the court considered some of the aggravating factors set forth under California Rules of Court, rules 4.421 and 4.423.

However, we decline to infer the court's consideration of some of the California Rules of Court is sufficient to conclude the court gave due consideration to each of the *Miller* factors. Under section 190.3, factor (i), the court is required to consider "[t]he age of the defendant at the time of the crime." (§ 190.3, factor (i).) Case authority interpreting factor (i) of section 190.3 has held it "provides a basis for the court to consider that '"youth is more than a chronological fact"' and to take into account any mitigating relevance of 'age and the wealth of characteristics and circumstances attendant to it,' as *Miller* requires." (*People v. Gutierrez, supra,* 58 Cal.4th at p. 1388, relying on *People v. Lucky* (1988) 45 Cal.3d 259, 302.) Here, the sentencing court placed substantial weight on the circumstances of the offense, as well as the increasingly serious nature of defendant's crimes, but it did not discuss defendant's maturity or his prospects for rehabilitation. Nor did the court mention or discuss any aggravating or mitigating factors under section 190.3, which might permit us to infer it had considered whether there was "any mitigating relevance of 'age and the wealth of characteristics and circumstances attendant to it.'" (*Gutierrez,* at p. 1388.)

We recognize the trial court has discretion under section 190.5, subdivision (b) to give such weight to the relevant factors as it reasonably determines is appropriate under all the circumstances. (*People v. Palafox, supra,* 231 Cal.App.4th at p. 73.) As such, the court's failure to discuss certain factors under *Miller* could be explained by a lack of evidence implicating a particular factor. As our Supreme Court has explained, "if there is no indication in the presentence report, in the parties' submissions, or in other court filings that a juvenile offender has had a troubled childhood, then that factor cannot have mitigating relevance." (*People v. Gutierrez, supra,* 58 Cal.4th at p. 1390.)

We hesitate to conclude that certain factors were not mentioned by the sentencing court here because of a lack of relevant evidence. As we have explained, defense counsel submitted virtually no mitigating evidence on defendant's behalf, even though the record bears out some evidence of a lack of maturity. Specifically, defendant had not completed

high school, he had been unemployed since 2011, and he had a prior juvenile petition sustained for disruptive activities in school. On balance, the record and the court's comments during sentencing fail to persuade us that due consideration was given to each factor.

Second, although *Gutierrez* made clear that consideration of the *Miller* factors is mandatory, and defendant was sentenced after *Gutierrez* was published, we decline to presume the trial court necessarily followed *Gutierrez*. "'It is generally presumed that a trial court has followed established law ….'" (*People v. DeGuzman* (1996) 49 Cal.App.4th 1049, 1053.) However, even if we presume the sentencing court followed *Miller* and *Gutierrez*, the state of the record precludes us from determining whether the court abused its discretion in so doing. Even "discretionary decisionmaking" is subject to "some level of review, however deferential." (*People v. Superior Court* (*Alvarez*) (1997) 14 Cal.4th 968, 977.)

From the record before us, it is unclear whether the court gave due consideration to each of the *Miller* factors. Accordingly, the matter must be remanded to the trial court for resentencing. At resentencing, the trial court is ordered to consider the effect of Senate Bill No. 394, signed by Governor Brown on October 11, 2017, on defendant's sentence. In addition, the court should consider what effect, if any, *People v. Lozano* (2017) 16 Cal.App.4th 1286 and *People v. Franklin* (2016) 63 Cal.4th 261, 289 have on defendant's sentence.[2]

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[2]On October 11, 2017, Governor Brown signed Senate Bill No. 620 into law, which allows courts "in the interest of justice and at the time of sentencing or resentencing, to strike or dismiss [a gun use] enhancement otherwise required to be imposed by [sections 12022.5 and 12022.53]." Senate Bill No. 620 becomes effective January 1, 2018.

Here, the jury found true a gun use enhancement alleging defendant personally discharged a firearm causing death or great bodily injury (§ 12022.53, subds. (d), (e)(1)) in the commission of counts 1, 2, and 4. Because defendant's case must be remanded for resentencing, and resentencing will occur after Senate Bill No. 620 becomes effective, nothing shall preclude him from arguing the gun use enhancements imposed should be stricken or dismissed.

II. Counts 2 and 4

Next, defendant contends his sentence for attempted second degree robbery in counts 2 and 4 is unauthorized. He contends the trial court erred in imposing terms of two years six months because the punishment for attempted second degree robbery is a triad of 16 months, two years, or three years. According to defendant, he is entitled to one-third of the aggravated term on both counts 2 and 4, which is one year.

The Attorney General contends defendant is mistaken. He agrees the matter must be remanded for resentencing, but he asserts defendant is not entitled to one-third of the aggravated term. According to the Attorney General, the court must select 16 months, two years, or three years on count 4, and then impose a full consecutive term on count 2. We agree with the Attorney General.

Here, the prosecutor alleged the applicable triad was one-half of the triad for second degree robbery. That is, one year, one year six months, and two years six months. As a result, the trial court sentenced defendant to two years six months on count 2 and on count 4. The court stayed count 2 under section 654.

While section 664 generally requires that punishment for an attempted crime be one-half of the term of imprisonment prescribed for the offense, "[s]ection 664 is inapplicable to convictions for attempted second degree robbery." (*People v. Moody* (2002) 96 Cal.App.4th 987, 990.) "[T]he appropriate triad for … attempted second degree robbery offense is … 16 months, two years, or three years." (*Id*. at p. 990; see *People v. Neely* (2009) 176 Cal.App.4th 787, 797.) Accordingly, the court's imposition of two years six months on counts 2 and 4 was improper.

The Attorney General asserts that on remand, the court must select a term of 16 months, two years, or three years, and "then impose a full consecutive term." His contention is correct, but it is not technically precise: "[A sentence] cannot be both consecutive and stayed simultaneously because the two are mutually exclusive." (*People v. Cantrell* (2009) 175 Cal.App.4th 1161, 1164.)

Section 1170.1, subdivision (a) applies to the sentencing of offenders convicted of multiple felonies. This statute requires the court to impose a principal term, based on the offense with the longest term, and then impose subordinate terms for each consecutive offense "consist[ing] of one-third of the middle term." However, "[t]he one-third-the-midterm rule of section 1170.1, subdivision (a), only applies to a *consecutive* sentence, not a sentence *stayed* under section 654." (*People v. Cantrell*, *supra*, 175 Cal.App.4th at p. 1164, italics added.) When a sentence is required to be stayed under section 654, the court should impose a full-term sentence to ensure the "defendant's punishment is commensurate with his criminal liability" in the event the stay is lifted. (*Cantrell*, at p. 1164.)

We have inherent authority to correct an unauthorized sentence by modifying the judgment. (*People v. Relkin* (2016) 6 Cal.App.5th 1188, 1197–1198 [correcting a judgment on appellate court's own initiative to impose full midterm sentence, rather than one-third of midterm sentence, on a count stayed under § 654].) However, because this matter must be remanded for resentencing in light of our conclusion in part I, *ante*, we will order the trial court to resentence defendant on counts 2 and 4.

III. The Parole Revocation Restitution Fine

In his final claim on appeal, defendant contends a parole revocation restitution fine was improperly imposed because he was sentenced to a term of LWOP on count 1. The Attorney General agrees the fine is unauthorized.

"A parole revocation fine may not be imposed for a term of life in prison without possibility of parole, as the statute is expressly inapplicable where there is no period of parole. (*People v. Oganesyan* (1999) 70 Cal.App.4th 1178, 1183.)" (*People v. Jenkins* (2006) 140 Cal.App.4th 805, 819.) In addition, the fine may not be appended to a determinate term stayed under section 654. (*People v. McWhorter* (2009) 47 Cal.4th 318, 380 [imposition of parole revocation restitution fine improper where defendant sentenced

to death and a determinate sentence on another count stayed under § 654].) However, our Supreme Court has held the fine may be appended to an unstayed determinate term. (*People v. Brasure* (2008) 42 Cal.4th 1037.) This is so even where the defendant is sentenced to LWOP on one count, but he or she is sentenced to a determinate term on another. (*Id*. at p. 1075.)

Here, defendant was sentenced on count 1 to LWOP, but he was sentenced to an unstayed determinate term on count 4. The Supreme Court's decision in *People v. Brasure* suggests the fine was properly imposed. Nonetheless, in light of our conclusion that defendant's sentence must be vacated and the matter remanded for resentencing, we need not resolve this issue.

IV. Proposition 57

On November 8, 2016, following the submission of the parties' appellate briefs, California voters passed Proposition 57, the Public Safety and Rehabilitation Act of 2016. Proposition 57 eliminated a prosecutor's authority to direct file serious felony cases involving juveniles in adult court. (*People v. Marquez* (2017) 11 Cal.App.5th 816, 820, review granted July 26, 2017, S242660 (*Marquez*).)

There is a split of authority among California appellate courts as to whether Proposition 57 applies retroactively. "The weight of published authority concludes Section 4's elimination of direct filing authority does not require reversal for a juvenile convicted before Section 4 took effect—regardless of whether the conviction in question is final." (*People v. Pineda* (2017) 14 Cal.App.5th 469, 479, citing *Marquez*, *supra*, 11 Cal.App.5th at pp. 820–821, review granted July 26, 2017, S242660; *People v. Mendoza* (2017) 10 Cal.App.5th 327, 345, 348, review granted July 12, 2017, S241647; *People v. Cervantes* (2017) 9 Cal.App.5th 569, 580, 601–602, review granted May 17, 2017, S241323; see *People v. Superior Court* (*Walker*) (2017) 12 Cal.App.5th 687, 697–699, review granted Sept. 13, 2017, S243072; but see *People v. Pineda*, *supra*, at p. 81 [maj.

opn. finding Prop. 57 retroactive]; *People v. Vela* (2017) 11 Cal.App.5th 68, review granted July 12, 2017, S242298 [same].)

Defendant, who was 17 years old at the time of the crimes, was charged in criminal court pursuant to Welfare and Institutions Code former section 707, subdivisions (b) and (d)(1)). Our Supreme Court is presently considering whether juvenile offenders convicted in adult court before the effective date of Proposition 57 are entitled to a fitness hearing in juvenile court. As such, we invited the parties to submit supplemental letter briefs on the issue of whether Proposition 57 retroactively applies and, if so, what remedy defendant would be entitled to.

After considering the parties' supplemental briefs and the arguments therein, we conclude, consistent with our holding in *Marquez*, *supra*, 11 Cal.App.5th 816, review granted July 26, 2017, S242660, Proposition 57 does not retroactively apply.

DISPOSITION

Defendant's sentence is vacated. The matter is remanded to the superior court for resentencing not inconsistent with this opinion.

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PEÑA, J.

WE CONCUR:

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LEVY, Acting P.J.

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DETJEN, J.